FILE COPY

IN THE

Supreme Court of the United States

October Term, 1959

No. 958 [illegible]

WILLIAM Z. FOSTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, William Z. Foster, respectfully asks this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit which dismissed the appeal from a decision of the United States District Court for the Southern District of New York denying petitioner's motion to dismiss two indictments outstanding against him since July 20, 1948 and which affirmed a decision of the United States District Court for the Southern District of New York denying petitioner's motion for an order permitting him to depart from the Southern District of New York to which he is confined under the terms of his bail and permitting him to travel to the Soviet Union and to Czechoslovakia.

Opinions Below

The opinion of the [illegible] not yet been reported. The opinions of the District Court were not reported; copies of these opinions are contained in the appendix record in the Court of Appeals at pages 3a-5a.

Jurisdiction

The judgment of the [illegible] entered on May 12, 1958. Jurisdiction of this Court is conferred by 28 U. S. C. 1254.

Questions Presented

1. Whether the denial of a [illegible] pending for more than eleven years which cannot be tried because of a defendant's health and pursuant to which a defendant is restrained of his liberty to travel is appealable as a final decision within the meaning of Title 28 U. S. C. Section 1291.

2. Whether the continued pendency of indictments which can never be tried because of a defendant's health and pursuant to which a defendant is in perpetual restraint of his liberty to travel violates the Fifth, Sixth and Eighth Amendments to the Constitution.

3. Whether under the circumstances in this case the denial of petitioner's motion to travel violates the Fifth, Sixth and Eighth Amendments to the Constitution.

4. Whether the burden of proof imposed on petitioner violates the requirements of due process.

5. Whether the denial of petitioner's motion for leave to travel is arbitrary, unreasonable and constitutes an abuse of discretion.

Constitutional Provisions and Statute Involved

The constitutional provisions involved are the Fifth, Sixth and Eighth Amendments to the Constitution; the statute involved is 28 U. S. C. 1291, June 25, 1948, c. 646; 62 Stat. 929, amended October 31, 1951, c. 655 Sec. 48, 65 Stat. 726 and July 7, 1958, Pub. L. 85-508 Sec. 12 (e), 72 Stat. 348.

28 U. S. C. Section 1291, as amended, provides:

Final Decisions of District Courts.

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Statement of the Case

On July 20, 1948, petitioner and eleven others were indicted in the Southern District of New York on a single count charging them with having violated former Section 3 of the Smith Act (formerly 18 U. S. C. 11; present 18 U. S. C. 371) by conspiring from on or about April 1, 1945 and continuously thereafter up to July 20, 1948, (a) to organize the Communist Party as a society or group of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and (b) to teach and advocate the duty and necessity of overthrowing and destroying the Government of the United States by force and violence, in violation of Section 2 of the Smith Act (formerly 18 U. S. C. 10; present 18 U. S. C. 2385) (Tr. 1-8).[1] At the same time petitioner and

[1] Tr. refers to the printed record below. The record has been printed.

The record shows that petitioner can never be brought to trial.

"suffering primarily from [illegible] psychosis which has affected not only his [illegible] apparatus but also the [illegible]. Tr. 1[illegible]. He found that "appellee Mr. Foster's paranoid [illegible] of a [illegible] nature [illegible] could be present under the circumstances of a jail [illegible] and that [illegible] and that [illegible] Tr. 1[illegible].

On April 29, 19[illegible] Judge Rives denied Gaston's motion to restore the membership case to the trial calendar, holding (Tr. 1321):

> "I am convinced that [illegible] and irreparable harm to him if not in his death."

Dr. Riley's prognosis that [illegible] would not improve but would probably worsen was corroborated by [illegible]. In October 1957 petitioner suffered a stroke [illegible] of speech and right sided paralysis. Following this [illegible] petitioner had [illegible] and a series of [illegible] strokes (Tr. 1[illegible]. By [illegible] and September of 1958, his condition was [illegible] considerably worsened and his prognosis was "much more guarded" (Tr. 1[illegible].

The motion to dismiss the indictments and the motion for leave to travel.

In June 1958 petitioner [illegible]. Except for a brief period in the spring and summer of 1958, petitioner had been confined to his home since the middle of October 1957. He [illegible] that the [illegible]

any substantial improvement in his condition of paralysis but that under more favorable conditions such as institutional care in a warm climate where physiotherapy, hydrotherapy and other rehabilitative measures were available a greater degree of improvement could be obtained and his right shoulder muscles re-educated and brought back to partial use (Tr. 155).

Petitioner believed that the cost of institutional care in the United States for such treatment was beyond his means and that he could obtain such care and treatment in the Soviet Union without the prohibitive cost he would be required to meet here. Accordingly, on June 16, 1959, petitioner moved in the United States District Court for the Southern District of New York for an order dismissing the conspiracy and membership indictments on the ground that since he could never be brought to trial the continued pendency of the indictments violates the Fifth, Sixth and Eighth Amendments to the Constitution. Petitioner also moved in the alternative for an order granting him permission to depart from the Southern District of New York and to travel to the Union of Socialist Soviet Republics for the purpose of obtaining medical care and treatment (Tr. 12-16a). Affidavits were submitted in support of the motion (Tr. 141-155). The Government made no attempt to controvert the medical data as to petitioner's condition nor did it seek his examination by court appointed doctors. It chose instead to ignore the medical data and posture its arguments as if the record showed that petitioner could some day be brought to trial.

Oral argument on the motion was heard June 23, 1959 before Honorable [illegible] in the United States District Court for the Southern District of New York. On July 2, 1959, Judge [illegible] denied the motion to dismiss the indictments primarily on the ground that he could find no authority to take such action in the absence of consent by the Govern-

ment (App. 2a). Judge Noonan denied the motion for the extension of appellant's bail limits, with leave to renew the application, on the grounds that the "moving papers are defective in that there is no indication that the surety consents to such an order" (App. 2a).

In September 1959, pursuant to leave granted to renew the motion, petitioner moved in the District Court for the Southern District of New York for an order permitting him to depart from the Southern District of New York and to travel to the Soviet Union and/or Czechoslovakia for the purpose of obtaining medical care and treatment (Tr. 180-188; 203). The motion was supported by a series of affidavits including one of the surety (Tr. 181-185; 197-217). In addition to the medical data submitted in support of the first motion and medical data which showed a marked deterioration in petitioner's general condition and in his condition of paralysis since the first motion was made, petitioner also showed the following:

Petitioner's wife who was then 80 years of age was also ill and almost totally disabled (Tr. 206). Petitioner was unwilling in view of their general condition and advanced age to separate from his wife. Hence, whatever institutional care he could obtain would also have to be provided for his wife (Tr. 197). Petitioner's attending physician advised that the treatment petitioner required was a prolonged one which might extend during the course of one year (Tr. 205).

Investigation by petitioner's counsel disclosed that the requisite institutional treatment in the United States would exceed $30.00 a day each for petitioner and his wife, making the total cost in excess of $60.00 per day (Tr. 202). Petitioner stated under oath that the cost to him for the kind of treatment he and his wife required was prohibitive (Tr. 198).

Mr. [illegible] appealed to the Court of Appeals.

Petitioner and his wife received an invitation from the Central Council of Trade Unions of Czechoslovakia to visit Czechoslovakia for the purpose of receiving medical care and treatment without cost to petitioner (Tr. 209, 211). A similar invitation was extended to petitioner and his wife by the Soviet Society for Therapeutists and the Trade Union of Medical Personnel of the Soviet Union to visit the Soviet Union for that purpose and without cost to him (Tr. 213, 214). Petitioner stated under oath that he had no intention of permanently leaving the United States and that if granted leave to depart he would return to the United States within the period required for his return by the order granting him leave to depart (Tr. 199).

As on the first motion, the Government here made no attempt to controvert the medical data or to seek examination by court appointed doctors. Argument on the motion was heard on October 8, 1959 before Honorable David N. Edelstein, District Judge for the Southern District of New York. On October 21, 1959, Judge Edelstein in a written opinion denied petitioner's motion (App. 4a-5a). Judge Edelstein declined to rule on petitioner's contention that he could never be brought to trial, holding that "it would be inappropriate on this motion to decide whether or not the defendant will ever come to trial. The indictments are still outstanding and to that extent they are not academic" (App. 5a).

In determining the motion Judge Edelstein weighed the illusory Government interest in petitioner's availability for a trial which could never take place against the "humanitarian implications" of petitioner's plight and concluded (App. 5a):

> "I cannot find that he has made such a showing of the unavailability of facilities for his purposes and of such circumstances as to outweigh the Government's interest in his continued presence in the jurisdiction, even

taking into account the state of his health. Accordingly, the motion is denied."

Petitioner appealed from the order denying his motion to dismiss the indictments and the order denying his motion for leave to travel. The appeals were consolidated by order of the court below (App. 6a-7a).

Petitioner contended in the court below that the continued pendency of the indictments, imposing as it did a lifetime restriction on his right to travel and other consequences of harrassment and anxiety, deprived him of his liberty to travel in violation of the Fifth Amendment; imposed punishment without judicial trial in violation of the Sixth Amendment; and inflicted cruel and unusual punishment in violation of the Eighth Amendment. Petitioner also contended that the denial of his motion for leave to travel violated his constitutional rights and also constituted an abuse of discretion. Petitioner's claims of deprivation of his constitutional rights rested on his conclusive showing that he can never be brought to trial.

The court below wholly ignored the decisive fact on which petitioner's claims rested. It made no finding on this question but disposed of the issues as if the record showed that plaintiff could someday be brought to trial. It dismissed the appeal from the order denying petitioner's motion to dismiss the indictments on the grounds that the order did not constitute a final decision within the meaning of Title 28 U. S. C. Section 1291. It affirmed the order d

nying the motion to travel for the following reasons (*Op. cit. supra*, p. 350):

> "The Government asserts that the United States has no extradition treaty with the Soviet Union and that its extradition treaty with Czechoslovakia does not apply to the crimes with which he is charged. Nor would Foster be subject to enforceable process in either of those countries. He has not promised to return if the medical treatment he expects to obtain improves his health sufficiently to permit him to stand trial, nor would court appointed doctors be able to examine him to determine that fact. Finally, as Judge Edelstein found the appellant did not make such a showing of the unavailability in this country of medical facilities suitable for his needs and financial circumstances as to outweigh the Government's interest in having him continue to be reachable by judicial process. There was no abuse of discretion in denying the motion and the order should be affirmed."

Reasons for Granting the Writ

The court below, in this case, has decided important questions of federal law which have not been but should be settled by this Court; and it has, in some respects, decided these questions in a way which conflicts with applicable decisions of this Court.

The plain effect of the decision below is to vest in the United States Attorney the arbitrary and unreviewable power to keep an accused under lifetime restraint of his liberty to travel and to perpetuate other forms of harassment through the instrument of indictments which can never be tried and which can never be dismissed — the United States Attorney giving his consent to the dismissal. For the district court held itself without power to dismiss the indictments in the absence of the consent of the United States Attorney (App. 20). The court below held itself without jurisdiction to even hear the appeal from the denial of the motion to dismiss the indictments. The district court denied the motion for leave to travel because in its view the mere technical existence of the indictments vests Government with an interest in petitioner's presence in the jurisdiction for a trial which could never take place. And the court below affirmed this denial on the basis of the same illusory interest of Government. In short, petitioner is subjected to perpetual restraint of his liberty to travel by the unreviewable power of the United States Attorney to continue the pendency of the indictments for the balance of petitioner's life. And this restraint finds no justification in any valid need or interest of Government.

The lifetime restraint of [illegible] liberties gives rise to substantial constitutional questions. *United States v. Wilson*, 353 U. S. 194, 201-202.

I

The dismissal of the appeal from the order denying petitioner's motion to dismiss the indictments is in conflict with the congressional purpose of Title 28 U. S. C. Sec. 1291.

Initially there is presented the question of whether a denial of a defendant's motion to dismiss an indictment which can never be tried because of defendant's state of health and pursuant to which he is in perpetual restraint of his liberty to travel constitutes a "final decision" within the meaning of Title 28 U. S. C. Section 1291.

Section 1291 confers appellate jurisdiction on courts of appeals over "final decisions". It contains no definition of "final decision". The congressional purpose of the finality requirement is to prevent fragmentation of the issues and piecemeal disposition of the basic controversy in a single case "where the result of review will be 'to halt in the orderly progress of a cause and consider incidentally a question on which has happened to cross the path of such litigation' ". *Cobbledick v. United States*, 309 U. S. 323, 326. Accordingly this Court adopted the general judicial rule that a "decision" is final for the purposes of appeal "when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined". *St. Louis, Iron Mountain and Southern R. Co. v. Southern Express Co.*, 108 U. S. 24, 28.

This rule was never intended to preclude review of a decision which has final and irreparable effect on the rights of parties merely because the decision is not a final judgment terminating the cause of action. *Perlman v. United States*, 247 U. S. 7; *Cobbledick v. United States*, *supra*, 325-329; *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541, 545-546; *Stack v. Boyle*, 342 U. S. 1, 4. "While only a

sentence constitutes final [illegible] criminal case . . . it is final decision that Congress has made 'reviewable'". *Stack v. Boyle*, *supra*, at 12 (concurring opinion).

In dismissing the appeal the court below applied the general rule of finality as a mechanical and rigid rule without regard to the actual finality of the decision from which the appeal was taken. It ignored petitioner's contention that under the circumstances in this case petitioner's right to review was now or not at all and treated the case as though the denial of the motion to dismiss the indictment "leaves the indictment to be brought to trial in due course". (Op. *infra*, p. 33).

The finality of the decision here involved is plain. The issues framed by the indictment can never be tried. Unless the order is appealable petitioner will forever be kept under untriable indictment, will forever endure the violation of his constitutional rights under the Fifth, Sixth and Eighth Amendment. He will forever be deprived of essential liberties and forever may exercise them only at the sufferance of the courts. The vexations are continuing and perpetual. There is no possibility of ever obtaining redress in the mainstream of judicial litigation on the trial of the indictment, for there can never be a trial. In short the decision involved has a "final and irreparable effect" on petitioner's rights. Review will not halt the orderly progress of the cause. For there will never be progress of the cause. Hence it cannot be argued that review here would frustrate the purposes for which the finality requirement was imposed.

Parr v. United States, 351 U. S. 513 and *Cogen v. United States*, 354 U. S. 294, on which the court below relied, are distinguishable from the case at bar in major respects. In *Parr*, petitioner, under indictment, moved for a change of venue on the grounds that he could not obtain a fair trial in the District in which the indictment was returned. Peti-

tioner's motion was granted and the Government subsequently obtained a second indictment in a third District and moved to dismiss the first indictment. The indictment was dismissed and the defendant appealed. This Court held that the dismissal of the indictment was not appealable. The Court's decision turned on two basic principles neither of which obtains in the instant case. The first of these is the principle that only an injured party may appeal. It held that if the first indictment was viewed as a separate proceeding from the second indictment petitioner was not aggrieved. The second principle was based on the alternative view that the first indictment was not a separate proceeding from the second indictment. Under these circumstances the proceedings would not terminate until trial and conviction on the second indictment at which time petitioner could obtain review of the dismissal of the first indictment. It was on the theory of the availability of ultimate review of the question that the Court held that the finality requirement of Section 1291 disallowed appeal at that time from the decision dismissing the first indictment. There is no such ultimate availability of review in the case at bar.

Carroll involves a Government appeal from an order suppressing evidence illegally obtained. The Government contended that the suppression order was final because it left the Government without sufficient evidence to proceed to trial. This Court held the order was not appealable. The Court's decision was based in substantial part on the principle that appeals by Government are not to be favored (at 400, 406). Moreover, the facts of finality on which the Government relied were independent of the merits of the order from which it sought review. For, in order to reach a conclusion as to the finality of the order, the Court was first required to determine the sufficiency of the remaining evidence for the purpose of trial by examining unique facts, unrelated to the issues on the merits, and which were

no part of the record. It was in this connection that the Court noted (at 405): "appeal rights cannot depend on the facts of a particular case."

The case at bar involves a defendant's appeal and not the Government's. And here, unlike *Carroll*, the issues on their merits involve the finality facts. No independent search into facts unrelated to the issues on the merits of the appeal are required here to determine the final effect of the order.

To preclude petitioner from seeking review of the order at this time on the theory that the statutory requirement of finality is limited to final judgments is to preclude him from ever obtaining review of his claims of deprivation of constitutional rights. Such a narrow view of the meaning of the term "final decision" frustrates the congressional purpose to confer appellate jurisdiction on the court and finds no support in the purpose for which the finality requirement was imposed. The congressional purpose is to confer appellate jurisdiction, not to preclude it. "Due regard for efficiency in litigation must not be carried so far as to deny all opportunity for the appeal contemplated by the statutes." *Cobbledick v. United States*, *supra* at 329.

II

The continued pendency of the indictments under the circumstances in this case violates petitioner's constitutional rights under the Fifth, Sixth and Eighth Amendments.

A second question, and also one of first impression, is whether a defendant, who can never be tried because of his state of health, must suffer the continued pendency of indictments for the balance of his life. The question takes on added urgency where, as here, the indictments have been pending for almost 12 years; the defendant is 70 years of

age; the prognosis as to his continued existence is "guarded" and, as a consequence of the indictments, he is in perpetual restraint of his liberty to travel.

A. The lifetime pendency of indictments which can never be tried deprives petitioner of his liberty without due process of law.

The "right to travel is part of the 'liberty' of which a citizen cannot be deprived without due process under the Fifth Amendment". *Kent* v. *Dulles*, 357 U. S. 116, 125. Due process requires that the imposition of restraints have a reasonable relationship to the exercise of a legitimate governmental power. *Pore* v. *Brownell*, 356 U. S. 44, 58; *Sweezy* v. *New Hampshire*, 354 U. S. 234, 254; *United States* v. *Witkovich*, 353 U. S. 194; *Barton* v. *Seaton*, 353 U. S. 963; *Bolling* v. *Sharpe*, 347 U. S. 497, 499-500; *Nebbia* v. *New York*, 291 U. S. 502, 525; *Hegan* v. *Reclamation District 108*, 111 U. S. 701, 708. And that the "means selected shall have a real and substantial relation to the object sought to be obtained." *Nebbia* v. *New York*, *supra*, 525. As this Court observed in *Bolling* v. *Sharpe*, *supra* (at 499-500) "Liberty under law extends to the full range of conduct which the individual is free to pursue and *it cannot be restricted except for an appropriate governmental objective*". (Emphasis supplied.)

"When there is significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling". *Bates* v. *City of Little Rock*, 361 U. S. 516, 524. The State here has made no such showing. On the contrary the record shows no Government interest whatever to justify the restraint. For since petitioner can never be tried, the Government can have no interest in his continued presence in the jurisdiction. The unjustified lifetime restraint of petitioner's liberty to travel is a direct consequence of the continued pendency of the indictments. Hence the indictments should

have been dismissed. For protection against Government restraints of essential liberties extends to restraints which though unintended and not directly imposed are nevertheless the consequences which flow from Government action. *National Association for the Advancement of Colored People* v. *Alabama*, 357 U. S. 449, 461; *Bates* v. *City of Little Rock*, *supra*, 523.

B. The continued pendency of the indictments imposes punishment without judicial trial.

The continued pendency of the indictments results in the imposition of punishment without judicial trial in violation of the Sixth Amendment. The punishment consists of the lifetime deprivation of petitioner's liberty to travel and the imposition of a lifetime of harassment and anxiety, to the detriment of petitioner's health, produced by the perpetual threat of prosecution dangling over his head.[7] The harassment and anxiety to which we refer is not merely that which normally attends any criminal prosecution. It is the harassment of an ever present threat to try petitioner at *risk to his life*.

The Government has repeatedly avowed the intention of persisting in its efforts to bring petitioner to trial "as soon as his health permits" (Tr. 171). This intention is in flagrant disregard of the realities of petitioner's state of health. In view of the earlier rulings by the district court that trial of petitioner could not be had without risk to his life and the uncontroverted evidence of a continuing deterioration in his state of health, this intention is meaningful only if "as soon as his health permits" is read "as soon as we find a court willing to hazard his life". We do not

[7] All of the doctors who examined petitioner including court appointed doctors advised that the anxiety and strain of the indictments hanging over his head affected petitioner's state of health adversely (Tr. 77, 80, 155).

believe that such a court will be found. But that belief does not remove the constant threat to petitioner's life implicit in the Government's avowal of an intention to persist in its efforts to bring him to trial. The only other meaning which can be given to the Government's insistence on keeping the indictments alive is its determination to harass petitioner and to keep him under perpetual surveillance and restraint. Indeed we suggest it is this determination which dominates the Government's insistence on hanging on to patriable indictments. The reason for the insistence is not difficult to ascertain. The Government plainly stated that one of its reasons for opposing petitioner's request for its consent to the dismissal of the indictments was that "as Chairman Emeritus of the Communist Party of the United States, Foster today through his writings and pronouncements continues to indicate party policy and activity" (Tr. 1714). This is a blatant encroachment on petitioner's First Amendment rights.

As the late Mr. Justice Jackson observed in commenting on a similar attempt to curb rights under bail in *Williamson v. United States*, 184 F. 2d 280, 283:

> "If the courts embark upon the practice of granting or withholding discretionary privileges or procedural advantages because of expressions or attitudes of a political nature, it is not difficult to see that within the limits of its logic the precedent could be carried to extremities to suppress or disadvantage political opposition which I am sure the Department itself would deplore."

"It would be fair to ask what the reason could be [Government's] insistence on keeping all these indictments alive. Why does it not dismiss them? Petitioner is a 70-year-old man, [illegible] to his bed with [illegible] short span of life remaining to him. [illegible] [illegible] [illegible]

The deprivation of civil or political rights constitutes punishment if unsupported by any valid interest of government. *Cummings v. Missouri*, 71 U. S. 277, 319-320; *Trop v. Dulles*, 356 U. S. 86, 95-96; *Speiser v. Randall*, 357 U. S. 513, 527-528. Here there is no valid interest of the government which justifies the continued pendency of the indictments and the deprivations it imposes. Hence the continued pendency of the indictments imposes punishment.

The use of indictments to deprive petitioner [illegible] of his right to travel and to punish him by harassment and anxiety for his political affiliations and beliefs violates the constitutional proscription against punishment without judicial trial. *United States v. Lovett*, 328 U. S. 303, 316-17; *Wong Wing v. United States*, 163 U. S. 228; *Bridges v. Richardson*, 182 F. 2d 46 (C. A. D. C. 1950), aff'd 341 U. S. 918.

C. The continued pendency of the indictments imposes cruel and unusual punishment in violation of the Eighth Amendment.

The lifetime pendency of an indictment from which no release is possible short of death, the resulting anxiety, harassment and deterioration in petitioner's state of health and the lifetime restriction of his right to travel constitute cruel and unusual punishment barred by the Eighth Amendment. The Eighth Amendment forbids subjecting an individual to ever increasing fear and distress and to the continuous uncertainty of his status. *Trop v. Dulles*, 356 U. S. 86, 101-102; or the continuous and lifetime restraint of essential liberties. *Weems v. United States*, 217 U. S. 349, 366-377.

As in *Weems v. United States*, petitioner [illegible] is perpetually restrained of his liberty. He cannot work at [illegible] within voice and sight of the [illegible] magistrate". He is subject to the oppression of [illegible] restrictions on his freedom of movement. He is stripped for life of his [illegible]

tial liberty to travel and is compelled to beg for leave to depart from the jurisdiction not only for so vital a reason as to seek medical treatment of his own choice but also for every trip he desires to make outside of the District for whatever reason one normally has in day to day living. As a result of this restriction he has been deprived of an opportunity to alleviate his condition of paralysis in the manner which he believes will accomplish that end. He is under virtual lifetime house arrest.'

As in *Trop v. Dulles*, *supra* at 101 [sic], petitioner is stripped of his right to have rights. He is perpetually denied his constitutional right to travel and may do so only at the sufferance of the court. He is subjected to the 'fate of ever increasing fear and disgrace' and the constant threat of prosecution at hazard to his life. This threat has been a continuous one. The mere fact that the Government has not been successful in its attempts to bring appellant to trial does not dissipate the impact of the threat. 'The threat makes the punishment obnoxious'. *Trop v. Dulles*, *supra*, at 102. It is cruel and unusual punishment to gradually strip a man of his life by the constant threat that he will be tried despite the risk to his life. In *United States v. Chase*, 135 F. Supp. 250 (N. D. Ill.), the court in dismissing an indictment pending for twenty years stated that '[t]o keep him in suspense for so long a time for twenty years approaches the inhuman'. . . . In time of suspense is no less inhuman. Traditional penalties do not include [illegible] forms of punishment any more than they include the [illegible] restriction of essential freedoms.

D. The continued pendency of the indictments under the circumstances in this case violates the Sixth Amendment command of a speedy trial.

This Court has never before considered the application of the Sixth Amendment command that an accused shall be given a speedy trial to a case in which the accused could never be tried because of the state of his health. We contend that the Sixth Amendment requires the dismissal of an indictment which can never be tried.

The command that "in all criminal prosecutions, the accused shall enjoy the right to a speedy [illegible] trial" is unqualified. It was designed to protect an accused from the oppression and harassment which follows from governmental action in keeping him hanging under the continuous threat of prosecution. *Ex parte Peterkin*, [illegible] F. Supp. 741, 742 (N. D. Tex.); *United States v. [illegible]*, 135 F. Supp. 250 (N. D. Ill.). Moreover its purpose is not merely to prevent trial after long delay but also to protect an accused "from the harassment [illegible] and anxiety attending it". *Ex parte Peterkin*, *supra*, at 742.

It is precisely this kind of governmental action which is here involved. Although it is true that the Government made several attempts to bring petitioner to trial and hence cannot be deemed in default, it is equally true that the Government has used this indictment as a constant threat against petitioner for more than eleven years despite the uncontradicted medical data which establishes that he can never be brought to trial. We submit that the lifetime pendency of indictments which can never be tried violates the letter and spirit of the Sixth Amendment command.

The Government contended in the court below that a demand for trial is a precondition to the assertion of this right under the Sixth Amendment. This view misconceives the basic theory under which the failure to demand trial has relevance to a consideration of the constitutional right

involved. The right has been held one which may be waived by a defendant and the failure of a defendant to demand a trial constitutes, under certain circumstances, a waiver of his right. *United States v. Lovelace*, 258 F. 2d. 475, 477, 478 (C. A. 2, 1958); *Beeks v. United States*, 256 F. 2d 15, 218 (C. A. 6, 1958). The failure to demand may or may not evidence a waiver. The essential question therefore, is whether there has been a waiver of the right, not whether there has been a demand for trial.

"Waiver is ordinarily an 'intentional relinquishment or abandonment of a known right or privilege,'" and the determination of whether there has been a waiver must depend in each case on the particular facts and circumstances there involved. *Johnson v. Zerbst*, 304 U. S. 458, 464. Thus the failure to make the demand does not evidence a waiver of the right to a speedy trial when it would have been of no avail, as in the case of delay caused by trial in a district of improper venue (*United States v. Provoo*, 17 F. R. D. (S.D.M.); or if the accused did not know of the indictment charges (*Beeks v. United States*, 256 F. 2d 209, 261 (D. C. Cir. 1958); or where the defendant because of imprisonment, ignorance or lack of legal advice was not in a position to claim his right (*Hyde v. United States*, *supra*). In short where the defendant is powerless to take this action the failure cannot be construed as a waiver (*Beeks v. United States*, *supra*, at 261).

In the case at bar petitioner was powerless to take this action. He was never in a position to demand a speedy trial since his state of health prohibited trial. "Waiver of constitutional rights [is not lightly to be inferred]" (*Smith v. United States*, 360 U. S. 1, 10; *Johnson v. Zerbst*, *supra*, at 464; *Provoo v. United States*, *supra*, at 261). Certainly a waiver of his constitutional right to a speedy trial cannot be inferred from petitioner's failure to demand trial at risk to his life.

Where constitutional liberties are involved governmental power will be narrowly construed. *United States v. Wheelock, supra*, 201-202; *Kelly v. United States v. Brooks*, 245 U. S. 41, 46. In the case at bar governmental power has been so broadly construed as to vest in the United States Attorney the excessive and unreviewable power to maintain the pendency of untriable indictments for the lifetime of the accused in spite of the perpetual restraints of constitutional liberties it imposes.

III

The denial of petitioner's motion to travel violates the Fifth, Sixth and Eighth Amendments.

The essential question here involved is whether a defendant, who can never be tried because of the state of his health, may be restrained of his liberty, travel under the conditions of bail or in balance of his life. The district court avoided the question by holding that the mere technical existence of the indictment precluded any consideration of whether petitioner could ever be brought to trial (App. 5a). The court below avoided this question by ignoring the record and treating the case as though it involved a defendant who could some day be brought to trial (Op. *supra*, p. 3). In short the decisions were made in utter disregard of the crucial facts of record and to that extent the case was decided in a manner which has so far departed from the accepted and usual course of judicial proceeding as to call for the exercise of this Court's power of supervision. Moreover the case was decided in a manner which conflicts with applicable decisions of this Court and which gives rise to important [illegible]

The function of bail is to assure [illegible] It is to provide [illegible] assurance that the accused will appear for trial and submit to the sentence if found guilty. *Hudson v. Parker*, 156 U. S. 277, 285. Thus [illegible] 342 U. S. 1, 4; *Bandy v. United States*, 81 S. Ct. 197, and the conditions

of bail must be relevant to this purpose. *See supra* at p. 2. This limitation excludes restrictions on the right to travel, *Kent v. Dulles*, 357 U.S. 116 (1958); *United States v. Guest*, 383 U.S. 745 (1966), or any other restraint that has no relevance to the purpose for which bail may be authorized.

It is not the function of [illegible] the need for the [illegible] the defendant [illegible] government [illegible] *See Stack v. Boyle*, 342 U.S. 1 (1951); *Carlson v. Landon*, 342 U.S. 524 (1952); *Bell v. Wolfish*, 441 U.S. 520 (1979); *Hudson v. Palmer*, 468 U.S. 517 (1984). Thus, the interest [illegible] of restraints on [illegible] *See Youngberg v. Romeo*, 457 U.S. 307 (1982); *People v. Hampton*, 746 F.2d 1472 (11th Cir. 1984). [illegible] cannot be based [illegible] constitutional presumption [illegible] all.

Under these circumstances, [illegible] herein at pp. 10-12, as to the [illegible] the denial of pretrial release [illegible] proves him of the [illegible] violation of the Fifth Amendment [illegible] without [illegible] Sixth Amendment, and [illegible] must be in violation of the Eighth Amendment.

IV

The burden of proof imposed on petitioner violates the requirements of due process.

V

The denial of petitioner's motion for leave to travel constitutes an abuse of discretion.*

We submit that on this record all that was required to tip the scales in petitioner's favor was his showing of the need to improve his health and his opportunity to do so. It was therefore arbitrary and unfair to require petitioner to weight the scales with the requirement that he specify the unavailability of facilities in this country for his purposes and in his circumstances. And it was an abuse of discretion to tip the balance against this weighty right by the trivial or even technical inconvenience the government might be put to in having petitioner bear the cost of a trial which could never take place.

Moreover although the burden of proof was on petitioner, he was improperly required to prove a negative—that he conclusively met the burden. Petitioner showed that the cost of institutional care which he could not afford without waiver was in excess of $200 per day—a cost of more than $1,000 for the period during which his doctor suggested he might require treatment (Tr. 201, 202).

The district court found that petitioner made "no claim of indigence, and only in very general terms on information and belief in the affidavit of counsel, that the cost of care he requires is beyond his means in this country" (App. 36a). But the court was in error in finding that petitioner's "claim" that the cost is beyond his means rests on the affidavit of counsel. Petitioner himself stated under oath in an affidavit submitted to the court that "the cost involved is beyond my ability to pay" (Tr. 188a).

In *Adkins v. E. I. DuPont de Nemours & Co.*, 335 U. S. 331, this Court held that a pauper's sworn statement of inability to pay the $15 initial cost of an appeal, set forth in an affidavit, was sufficient to support an application to proceed *in forma pauperis*. The decision was based on the theory that "one who makes this affidavit exposes himself to the pains of perjury in case of bad faith" (335 U. S. at 339). The same reasoning applies with added force to the circumstances at bar. Here petitioner's request for relief involves no cost to the government.

The Government offered no evidence to controvert petitioner's evidence of the cost of obtaining the kind of treatment he requires in this country. Nor did it offer any evidence to controvert petitioner's sworn statement that he was unable to pay the cost involved. It merely asserted in its affidavit in opposition (Tr. 191):

> "it is a matter of common knowledge that fine medical care is available in the United States even on an indigent basis. On information and belief the defendant is far from indigent."

If we proceed on the theory of "common knowledge" it might be pertinent to observe that while it is common knowledge that medical treatment and care are available to the indigent it is also common knowledge that the cost of treatment for serious illness to the non indigent who can make partial payment for medical treatment often imposes so staggering a burden as to impoverish and to create a substantial indebtedness. And it is also common knowledge that the indigent or partially indigent do not receive the same benefits and facilities as are made available to those whose resources are unlimited.

The plain fact as shown by the record is that petitioner's condition of paralysis did not improve—rather it became worse. During the now more than two years since he sustained the condition of paralysis he was confined to his bed. It needs no speculation to point to the miserable circumstances of his existence. It cannot be lightly assumed that petitioner would voluntarily deprive himself of facilities and treatment which his doctor advises may result in substantial improvement in his condition. If he did not avail himself of the facilities and treatment he requires [illegible] [illegible] [illegible]

is because they were not available to him in his circumstances. Certainly the problem was rendered more difficult by petitioner's understandable desire not to separate from his ill and almost totally disabled wife who is more than [illegible] years of age. It is the height of cynicism to assume that the requisite facilities were available in this country to treat petitioner and his wife under circumstances which would permit them to reside together during the extended period of the treatment and which would not involve a staggering cost. The invitations extended to petitioner and his wife offered the treatment they required without separation and without cost to petitioner.

Is the Government's illusory interest in petitioner's availability for a trial which can never take place so compelling as to require that petitioner forego the needed cure and treatment he and his wife had no cost to him? Is it so compelling as to preclude him from exercising his constitutional right to travel for that purpose? And is it so compelling as to require him to exhaust, as he must here, all of his available resources to obtain the treatment he requires? We submit it is not.

In view of the foregoing petitioner met the [illegible] proof imposed on him by the district court. And its finding that petitioner failed to make the showing it required is arbitrary and against the overwhelming weight of the evidence, and constitutes an abuse of discretion.

The court below held that it was not an abuse of discretion in denying the motion, primarily because petitioner would not be subject to enforced [illegible] while in the countries he sought permission to visit and because of its belief that petitioner did not promise to return if his health was sufficiently improved to permit him to stand trial (*supra*, p. 35). The court below was mistaken in its belief that petitioner did not promise to return to stand trial. The fact is that petitioner in a sworn statement did promise to return

within the period fixed by the court for his return (Tr. 199). Moreover the district court made no finding that petitioner would not return if required. In any event petitioner's willingness or unwillingness to return and the fact that petitioner would not be subject to enforceable judicial process while in the countries he desires to visit has no bearing on the issues, since he can never be tried. The need to exercise judicial process which would require petitioner's presence in the jurisdiction simply does not exist. Thus the court below sanctioned the deprivation of petitioner's constitutional right to travel without regard to the requirement that "When there is a significant encroachment upon personal liberty the state may prevail only upon showing a subordinating interest which is compelling".

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

MARY M. KAUFMAN,
Attorney for Petitioner

APPENDIX

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 270—October Term, 1959.

(Argued April 11, 1960 Decided May 12, 1960.)

Docket No. 26025

UNITED STATES OF AMERICA,

Appellee,

-v.-

WILLIAM Z. FOSTER,

Defendant-Appellant.

Before:

SWAN, CLARK and FRIENDLY,

Circuit Judges.

Consolidated appeals from the United States District Court for the Southern District of New York.

Defendant appeals from an order of Judge Noonan denying a motion to dismiss two indictments pending against the defendant, and from a subsequent order of Judge Edelstein denying a motion to extend the limits of his bail bond to include the Soviet Union and or Czechoslovakia. Appeal from the first order dismissed; second order affirmed.

MARY M. KAUFMAN, *Attorney for Appellant.*

S. HAZARD GILLESPIE, JR., United States Attorney for the Southern District of New York, *for Appellee.* David Klingsberg and Gideon Cashman, Assistant United States Attorneys, of Counsel.

SWAN, *Circuit Judge:*

The orders which defendant seeks to have reviewed were made in criminal cases based on two indictments which have been pending against him since July 20, 1948. He pleaded not guilty and was released on bail. On July 2, 1959, Judge Noonan denied appellant's motion to dismiss the indictments. This is the first order brought up for review. Thereafter, on October 21, 1959, Judge Edelstein denied a motion to extend bail limits to permit Foster to travel to the Soviet Union and or Czechoslovakia for the purpose of obtaining medical care and treatment. This order was also appealed. By order of court the appeals have been consolidated.

The theory of the motion to dismiss is that the state of Foster's health is such that he can never be tried and that the pendency of the indictments under these circumstances

violates his constitutional rights. Before considering the merits of appellant's contention, it is necessary to pass upon the appellee's contention that an order refusing to dismiss an indictment is interlocutory and not appealable.

The jurisdiction of courts of appeal is limited by 28 U. S. C. A. 1291 to "final decisions." What constitutes a final decision in a criminal case has been recently discussed by the Supreme Court. *Parr v. United States*, 351 U. S. 513; *Carroll v. United States*, 354 U. S. 394. In the former, at page 518, the opinion states:

> "'. . . In general, a "judgment" or "decision" is final for the purpose of appeal only "when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined."
>
> . . . . . .
>
> "Final judgment in a criminal case means sentence.'"

In the *Carroll* case the court said at page 405 that "Appeal rights cannot depend on the facts of a particular case."

We think it clear that there is an absence of final action in denying a motion to dismiss an indictment. It leaves the indictment to be brought to trial in due course—as does denial of summary judgment in a civil action. Nor do we think the order appealable under the "collateral order rule" applied in *Cohen v. Beneficial Loan Corp.*, 337 U. S. 541 and *Eisman v. United States*, 347 U. S. 7 upon which appellant relies. Cf. *United States v. Golden*, 2 Cir., 229 F. 2d 877. Accordingly the appeal from the first order must be dismissed.

In support of the appealability of Judge Edelstein's order refusing to extend bail limits *Stack v. Boyle*, 342 U. S. 1

is relied upon. Appellant argues that there is no distinction in principle, with respect to appellate jurisdiction under 1291, between an order fixing excessive bail and an order denying relief from unreasonably restrictive conditions of bail. The question is not free from doubt. In the *Stack* case at page 6 the court said:

> "'As there is no discretion to refuse to reduce excessive bail, the order denying the motion to reduce bail is appealable as a "final decision" of the District Court under 28 U. S. C. 1291.'"

In the case at bar whether the bail limits should be extended is a matter within the discretion of the judge. Hence recognition of the appealability of the order is somewhat of an extension of the *Stack* case. But in the rare case where the movant contends that denial of the motion is an arbitrary exercise of discretion and violates his constitutional rights, we believe the order should be appealable.

"As stated by Judge Edelstein, 'The basis for the instant motion is a medical opinion that he needs institutional care in a warm climate where certain rehabilitative measures are available, and that the cost of such institutional care in this country is beyond his means, whereas he has received invitations from organizations in the Soviet Union and Czechoslovakia which undertake to provide the care free of charge. The Government opposes the motion inasmuch as the defendant would not, in these countries, be amenable to service of judicial process nor would he be extraditable.'".

The function of bail is to assure the presence of the accused when required by the court in a pending criminal case. *Stack* v. *Boyle*, 342 U. S. 1, 5; *United States* v. *Wilcox*, 2 Cir. 155 F. 2d 1002, 1004. The propriety of imposing territorial limitations as a condition of granting release on bail cannot be doubted, nor can the court's power in fix-

discretion to expand the limits originally fixed. *United States v. Foster*, 68 D. N. Y. 1, 79 F. Supp. 422; *Reynolds v. United States*, 80 Sup. Ct. 30. In the latter case Mr. Justice Douglas granted Dr. Reynolds' request to be permitted to go to Japan. There the Government was satisfied that he would perform his promise to return if his conviction were affirmed by the appellate court. The situation with respect to Foster is very different. The Government asserts that the United States has no extradition treaty with the Soviet Union and that its extradition treaty with Czechoslovakia does not apply to the crimes with which he is charged. Nor would Foster be subject to enforceable process in either of those countries. He has not promised to return if the medical treatment he expects to obtain improves his health sufficiently to permit him to stand trial, nor would court appointed doctors be able to examine him to determine that fact. Finally, as Judge Edelstein found the appellant did not make such a showing of the unavailability in this country of medical facilities suitable for his needs and financial circumstances as to outweigh the Government's interest in having him continue to be reachable by judicial process. There was no abuse of discretion in denying the motion and the order should be affirmed.

The appeal from the first order is dismissed; the second order is affirmed.

PETERSEN, *Circuit Judge*, concurring as to the appeal from the second order:

In *Carroll v. United States*, 354 U. S. 394, 403 (1957), the Supreme Court characterized *Stack v. Boyle*, 342 U. S. 1, 6 (1951), as "The only decision of this Court applying to a criminal case the reasoning of *Osborn v. Bank of United States*, 9 Wheat. 738, 866, 6 L. Ed. 204, which has come down through the years as a landmark in the field of equity jurisprudence, *Deckert v. Independence Shares Corp.*, 311 U. S. 331, 339, 61 S. Ct. 268, 272, 85 L. Ed. 212, *Scripps v. Reilly*, 38 Ohio St. 10, 43 Am. Rep. 413, *Ex parte Young*, 209 U. S. 123, 28 S. Ct. 441, 52 L. Ed. 714, 13 L. R. A., N. S., 932, 14 Ann. Cas. 764, *Hecht Co. v. Bowles*, 321 U. S. 321, 329, 64 S. Ct. 587, 591, 88 L. Ed. 754, *Virginian Ry. Co. v. System Federation No. 40*, 300 U. S. 515, 552, 57 S. Ct. 592, 606, 81 L. Ed. 789, *Mitchell v. Donaldson*, 10 Pa. 410, 49 Am. Dec. 606, *Ex parte Bradley*, 7 Wall. 364, 19 L. Ed. 214, *Ex parte Rowland*, 104 U. S. 604, 26 L. Ed. 861, *Ex parte Peterson*, 253 U. S. 300, 40 S. Ct. 543, 64 L. Ed. 919, *Ex parte Fahey*, 332 U. S. 258, 67 S. Ct. 1558, 91 L. Ed. 2041, *Ex parte Collett*, 337 U. S. 55, 69 S. Ct. 944, 93 L. Ed. 1207, *Ex parte Milligan*, 4 Wall. 2, 18 L. Ed. 281, *Ex parte Quirin*, 317 U. S. 1, 63 S. Ct. 2, 87 L. Ed. 3, *Duncan v. Kahanamoku*, 327 U. S. 304, 66 S. Ct. 606, 90 L. Ed. 688, *Ex parte Endo*, 323 U. S. 283, 65 S. Ct. 208, 89 L. Ed. 243, *Ex parte Mitsuye Endo*, 323 U. S. 283, 65 S. Ct. 208, 89 L. Ed. 243

sion in *Carroll* to indicate that the Courts of Appeals are not to be astute to extend *Stack* v. *Boyle*. The opinion in that case shows that the rule of appealability there announced was not intended to include those applications for reduction of bail which "merely invoke the discretion of the District Court setting bail within a zone of reasonableness"; it related only to such applications as "challenged the bail as violating statutory and constitutional grounds," which, in consequence, the District Court would have "no discretion to refuse." Here the application was addressed to the discretion of the district judge. It required a weighing of Foster's interest in obtaining medical care abroad which was alleged to be beyond his means at home, against the government's interest, great or small as this here may be, in having him amenable to process. Foster has no constitutional right to travel to the Soviet Union and Czechoslovakia; in the very decision on which he relies the Court emphasized, "We must remember that we are dealing here with citizens who have 'neither been accused of crimes nor found guilty.'" *Kent* v. *Dulles*, 357 U. S. 116, 130 (1958).

I would therefore dismiss the appeal from Judge Edelstein's order for want of appellate jurisdiction. If we have jurisdiction as the majority believes, I would join for affirmance.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

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a Stated Term of the United States Court of Appeals, d for the Second Circuit, held at the United States House in the City of New York, on the twelfth day y one thousand nine hundred and sixty.

nt:

Hon. THOMAS W. SWAN,
Hon. CHARLES E. CLARK,
Hon. HENRY J. FRIENDLY,
Circuit Judges.

UNITED STATES OF AMERICA,

v.

WILLIAM Z. FOSTER,

Plaintiff-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM Z. FOSTER,

Defendant-Appellant.

Judgment

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Appeal from the order of said District Court denying a motion to dismiss two indictments pending against the appellant, be and it hereby is dismissed.

It is further ordered, adjudged and decreed that the order of said District Court, denying a motion to extend the limits of appellant's bail bond to include the Soviet Union and or Czechoslovakia, be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.